UNITED ORIENTAL ASSURANCE SDN. BHD. KUANTAN

v.

WILLIAM NORTHEY MAZZAROL

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
GEORGE SEAH FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 296 OF 1982]
20 JANUARY 1984

INSURANCE: *Marine insurance - Claim under hull and machinery insurance policy - Material non-disclosure - Whether oral disclosure to agent suffices - Whether loss due to peril of the sea or want of due diligence - Total loss - Whether actual or constructive.*

The respondent, an Australian, arrived in a home built boat off the coast of Kuantan. He insured the hull and machinery of the boat with the appellants through their agent, one Pany, for the sum of RM50,000. About three weeks later the boat while approaching the Kuantan river mouth struck an uncharted submerged sandbar and got stuck there. All attempts by the respondent to salvage her failed. The appellants insurance company resisted the respondent's claim. The trial Judge however found in the respondent's favour. The insurance company appealed.

The appellants raised the same issues as in the Court below. They were as follows:

(a) That in the proposal form the respondent failed to disclose that the boat had an earlier accident. Since a contract for insurance is an *uberrima fides* contract the appellants were entitled to avoid the contract for material non-disclosure. The respondent argued that none of the questions in the proposal form requested the pertinent information and in any event those facts had been disclosed to the appellant's agent.

(b) The appellants further argued that even if the insurance contract was valid they were not liable since the accident was not due to a peril of the sea but due to the lack of due diligence on the part of the respondent.

(c) The appellants also contended that the trial Judge's finding that the boat was a constructive total loss was wrong in that for a find of a constructive total loss there must be proof that the cost of recovering the boat would exceed her value when recovered.

Held:

[1] The questions in the proposal form were ambiguous and did not require the disclosure of the previous accident to the boat. Such ambiguity must be resolved, according to the *contra proferentum* rule in favour of the respondent.

[2] There is no presumption in insurance law that matters not dealt with in a proposal form are not material.

[3] That Pany was acting as an agent for the appellants and that the agent's knowledge is also the knowledge of the appellants.

[4] Therefore the appellants' submission on non-disclosure fails.

[5] The respondent was not negligent for there was no way in which he could have avoided the accident, on the facts of the case.

[6] The unexpectedness of the peril due to the action of the sea is the main element of the concept of a peril of the sea. The danger in this case was created by the sea and the accident in this case was a danger which no human skill can possibly avoid and guard against.

[7] It is not necessary that in every case wherein a constructive total loss is claimed there must be proof of the cost of recovering the ship. This proof is required only when the assured relies on the second situation in both limbs of s. 60 that is the boat could not be preserved from actual total loss or the cost of recovering her would exceed its value when recovered.

[8] The respondent could prove constructive total loss if he could show on points of fact that -

(a) the abandonment of the boat was reasonable;

(b) on the date of the commencement of the action it was unlikely on the basis of the true facts as they then existed that the boat could be recovered. The respondent had established the aforesaid.

[Appeal dismissed with costs.]

Per Curiam:
The proof envisaged in [7] above may also be relevant for determining the reasonableness of the abandonment.

Cases referred to:
Schoolman v. Hall [1951] 1 Lloyd Rep 139
Newsholme Brothers v. Road Transport and General Insurance Co. Ltd. [1929] 2 KB 356
Bawden v. The London, Edinburgh and Glasgow Assurance Co. [1892] 2 QB 534
Ayrey v. British Legal and United Provident Assurance Co. Ltd. [1918] 1 KB 136
Evans v. Employers Mutual Insurance Association Ltd. [1936] 1 KB 505
Marstrand Fishing Co. Ltd. v. Beer [1937] 1 All ER 158
Petros M. Nomikos Ltd. v. Robertson [1939] 64 Ll L Rep 45
Rickards v. Forestal Land, Timber and Railways Co. Ltd. [1941] 3 All ER 62

Legislation referred to:
Civil Law Act 1956, s. 5(1)

Other sources referred to:
Ivamy Marine Insurance, 3rd Edn. p. 358
Halsburys Laws of England 25, 4th Edn., para. 153, p. 92

For the appellant - Cecil Abraham (Wilfred S.J. Abrahamwith him) M/s. Shearn Delamore & Co.
For the respondent - Shah Balendran; M/s. Shah Balendran, Chong & Bodi

JUDGMENT

Salleh Abas CJ:

On 20 November 1977 the respondent, an Australian, who is a sailing enthusiast arrived in Kuantan waters in his boat called "Melanie", which he personally built and navigated single-handed from his hometown Burnside, South Australia. Upon arrival at Kuantan, he did not enter the Pahang river but dropped anchor outside the river mouth at a point about 500 yards to the south. He left the boat and went ashore by getting a lift in a passing fishing boat. During the night the sea dragged the anchor and the boat closer to the shore and left it grounded in low waters. With the help of a fishing boat the "Melanie" was set free and finally towed into the river and safely anchored in deep waters at the fishermen's jetty.

At the suggestion of his friend named Cassidy, a fellow Australian who had a similar boat and had earlier insured his boat with the appellant company, the respondent insured the "Melanie" with the appellant company through the latter's sales representative named Thandayuthapany (referred to as Pany), (PW2), who came to see him with a proposal form on 8 December, 1977. With Pany's help the respondent filled up the form, signed it and returned it to Pany, who in turn handed it to the branch office of the appellant company at Kuantan. Having received the completed proposal form, Peter D'Cruz (DW2), who is the local senior branch manager of the appellant company, issued a Cover Note on 10 December, 1977 insuring the hull and the machinery on board for RM50,000 for a year with effect from 15 December 1977. The premium was fixed at RM2,000, payable in two instalments. The first instalments of RM1,000 was paid on 13 December 1977, i.e. three days after the issue of the Cover Note and the balance of RM1,000 was to be payable on or after the issue of the Policy.

On 30 December 1977 at about 1.00 p.m. the respondent took out the "Melanie" from her mooring place at the jetty to sea with two other persons on board. On her return journey at about 3.30 p.m. on the same afternoon as she was approaching the river mouth the "Melanie" had an accident. She struck a portion of a submerged sandbar which, according to the charts, was marked as a sea-lane, whose depth ought to be about 9½ feet. She got stuck fast on it and the waves kept on pushing her to shallow waters. When the tide ebbed the "Melanie" was left securely grounded and forlornly listing on one side. Attempts to release her were unsuccessful because the sea was too rough.

The respondent could find no one to pull out the boat and by 3 January 1978, i.e. 4 days later he came to the conclusion that the boat was beyond salvage. He therefore made out a statement of facts and submitted it together with a sketch location plan to the appellant company and to the Kuantan Marine Department for the purpose of claiming the benefit under the insurance. The appellant company refused to entertain the claim and so the respondent started a civil suit, which is the subject matter of the present appeal, on 22 February 1978.

The trial was held before George J who gave judgment in favour of the respondent and hence this appeal.

In the appeal before us, Counsel for the appellant company raised the same issues as he did in the Court below and we will deal with these issues one by one.

Non-disclosure:

It is the submission of Counsel for the appellant company that a contract of insurance being an *uberrima fides* contract, they are entitled to repudiate their obligations because the respondent had been guilty of a non-disclosure for failing to disclose to them that the "Melanie" had an accident on 20 November 1977 (referred to in the judgment as "the earlier mishap"). Counsel for the respondent on the other hand submitted that the respondent was not guilty of any such non-disclosure because in the first place none of the questions in the proposal form which the respondent completed and signed required him to disclose such accident and in the second place the appellant company's agent, Pany, with whom the respondent dealt in effecting the insurance, had knowledge of the earlier mishap, because not only was he told by Cassidy but also by the respondent himself.

The proposal form has a number of questions. But only three of them are relevant for the purpose of this case. These are:

(a) Do you own any other vessels ... Answer: No.
(b) Give details of accidents that occurred in the last four years to these vessels? ... Answer: No.
(c) Any of these accidents relate to the vessel proposed for insurance? ... Answer: Not applicable.

A careful study of these questions clearly shows that the questioner only wanted to know whether such accidents as had occurred to a proposer's other vessels had any connection with or relation to his vessel which he proposed to insure. The questions are not directed to know whether the vessel he proposed to insure had any accident at all. As the respondent had no other vessels, we cannot see how the negative answers given thereto could be regarded as wrong and amounted to a non-disclosure. The negative answer to question (a) is certainly correct, because the respondent had no other vessels. Similarly, for the same reason the negative answer to question (b) is also correct, although it is more accurate for the respondent to state "not applicable" or "does not arise". The "not applicable" answer to question (c) is also correct because how could accidents occur to the respondent's other vessels when he did not own any such vessels and if there was no such accidents how could they be related to the "Melanie"? We certainly agree with the view expressed by the learned trial Judge when he observed in his judgment:

> "If in fact the plaintiff" (i.e. the respondent) did not own any other vessels, then accidents would not have happened to them and accidents that could not have happened could not relate to the vessel proposed for insurance".

The question, odd though they may sound to be, clearly exclude accident to the vessel proposed for insurance, unless the respondent had other vessels and these vessels had accidents and the accidents related to the vessel to be insured.

In our judgment the omission by the respondent to state the earlier mishap in the proposal form was therefore not his fault but that of the appellant company themselves for framing ambiguous questions. Such ambiguity must be resolved, according to *the contra proferentum* rule in favour of the respondent. (*Ivamy Marine Insurance*, 3rd Edn. p. 358).

At the bottom of the proposal form is a statement requiring the respondent to disclose fully and faithfully all the facts which he knew or ought to know, otherwise the policy issued thereunder could be void. Of course, there is no presumption in insurance law that matters not dealt with in a proposal form are not material. *Schoolman v. Hall* [1951] 1 Lloyd Rep 139 at 142. Thus it would appear that despite the fact that the respondent had correctly answered the questions in the proposal form he still had to disclose the earlier mishap to the appellant company. The next question is therefore whether communication of the earlier mishap to the appellant company's agent, Pany, is a sufficient communication.

There is a very clear evidence on this in that Pany knew of the earlier mishap because he was told by Cassidy who had informed him that the respondent wanted to insure his boat and that the respondent personally told him again on 8 December 1977 whilst he was completing the proposal form. But Pany, thinking that the information was not important, kept the information to himself and did not pass it on to his superior officers. He did, however, go to see the "Melanie" anchored at the fishermen's jetty and inspected her to order to satisfy himself as to her value. This was done before he had handed in the completed proposal form to the appellant company's branch office for further action. There is also clear evidence that Pany had assisted the respondent in completing the proposal form.

Whilst we agree that Pany must be regarded as acting as an agent for the respondent in so far as he assisted the former in completing the proposal form - see *Newsholme Brothers v. Road Transport and General Insurance Co. Ltd.* [1929] 2 KB 356 - we think that the learned trial Judge was correct in holding that Pany was not acting as an agent for the respondent, but acting on behalf of the appellant company when he received the information about the earlier mishap from Cassidy and the respondent. The capacity in which he received the verbal information must be the same as the capacity in which he went to see the respondent with the proposal form, gave it to him, received it back from him, inspected the "Melanie" and handed the form to his branch office. All these acts, except the tendering of advice as to how to fill the proposal form, were done in his capacity as an agent of the appellant company. Pany was a paid employee of the appellant company. He was paid a salary and also a commission based on the volume of business he brought in. Before he was sent to see the respondent with the proposal form on 8 December 1977 he had spoken to his branch manager, DW2, about the respondent's intention to insure the "Melanie", and in reply the branch manager told him that the appellant company would be interested in the cover. This evidence was confirmed by DW2 himself. This means that Pany was authorized to negotiate and settle the terms of the business on behalf of the appellant company. Consistent with this authority is his visit to the "Melanie" in order to see her for himself and be satisfied as to her insured value of RM50,000.

It is settled law that where an agent is authorized to negotiate and settle terms of a proposal or delegated with a duty to investigate certain matters, the agent's knowledge is also the knowledge of the insurance company. *Bawden v. The London, Edinburgh and Glasgow Assurance Co.* [1892] 2 QB 534; *Ayrey v. British Legal and United Provident Assurance Co. Ltd.* [1918] 1 KB 136 and *Evans v. Employers Mutual Insurance Association Ltd.* [1936] 1 KB 505.

Unlike the practice of marine insurance in the United Kingdom, where insurers sit tight in their offices and only deal with brokers who arrange insurance for their clients, the appellant company had chosen to conduct their business by employing their own sales representatives or agents and it is with them that their customers have to deal. Their customers do not go and see the managers or directors who sit in the office in order to buy insurance, but deal with the agents who go out to seek business for the appellant company. If a certain vital information necessary for the business is given to the agent by the customers, we cannot see how in law and on the basis of commercial expediency the appellant company could be allowed to take advantage of the fault of their own agent for failing to communicate the information to them. If they have chosen to adopt that system of employing agents and have authorised them to negotiate and settle business, they must accept the fault in the system as well. No blame could be held against their customers, because they have done everything that is required of them to do and also because it is reasonable for them to assume that the communication to the agent is equivalent to a communication to the insurance company's office.

We therefore hold that the appellant's submission on non-disclosure fails.

Peril of the sea or want of due diligence:

The next contention of the appellant company is this: Even if the insurance is valid because the respondent had not been guilty of non-disclosure, the appellant company is still not liable under the insurance because the accident resulting in the loss of the "Melanie" was not due to peril of the sea but due to the lack of due diligence on the part of the respondent.

As to these questions the matter is clearly a finding of facts. The learned Judge who heard the evidence made a finding that the respondent was not guilty of lack of skill or due diligence. The respondent had been a sailing enthusiast for the last 10 years before the accident at Kuantan. He had taken a six months' correspondence course in celestial navigation and chart reading and had even built the "Melanie" himself and navigated her single handed from his home town in Australia to Singapore, and from there up to Kuantan without any mishap; his final destination being Pattaya in Thailand. On his arrival at Kuantan waters, like any other good sailor he did not choose to navigate his boat into Pahang river but cast anchor outside the river mouth. On this evidence the learned Judge is amply justified in finding that there was no lack of skill or competence on the part of the respondent.

As to the accident, the learned trial Judge found that the portion of the sand-bar which the "Melanie" had struck was a submerged one and marked in the charts as the lane for the passage of vessels whose depth according to the charts should have been 9 ½ feet without taking into account the increase in the depth as a result of rise in river water. Thus, the charts are at variance with the physical conditions of the area which the charts are supposed to reflect. The physical changes occur much faster than the charts could be revised and must have occurred because of the constant work of the sea and the wind frequently changing the contours of the sea-bed. We agree with the observations of the learned Judge that there was no way in which the respondent could have done to avoid hitting the sand-bar, short of not venturing out to sea at all and that having regard to the position of the sand-bar, even the most experienced navigator of the area, like the port pilot, could not have avoided the accident. In our judgment the appellant's submission on the issue of negligence also fails.

The next question is whether hitting a submerged sandbank, which is shown by the charts not to be there, is a peril of the sea. There are many decided cases on the meaning and concept of perils of the sea. It is not necessary for us to go into the details of these cases as it is sufficient for our purpose to state here that peril of the sea is peril due to the sea and that it refers only to fortuitous accidents or casualities of the sea so that the damage could not be expressly guarded against. It is not a peril of the sea if the accident is caused by ordinary action of the winds and waves. Thus the unexpectedness of the peril due to the action of the sea is the main element of the concept. (*25 Halsburys Laws of England,* 4th Edn., para. 153 at p. 92).

Reverting to the facts of the present case, we are of the opinion that in view of the finding by the learned Judge that the accident was caused by the "Melanie" striking a submerged sand-bank which was marked in the charts to be a sea-lane cannot be otherwise than a fortuitous danger, a danger which no human skill can possibly avoid and guard against. The danger having been created by the sea, the accident to the "Melanie" must be due to peril of the sea. The appellant's submission of this issue thus fails.

Total loss, actual or constructive:

The Cover Note issued is for the marine hull insurance and states that it is subject "to all terms, conditions and clauses of the appellant company's Policy Form used for this class of business". The Policy covered total loss, actual or constructive. Obviously the learned trial Judge did not consider the case to be an actual total loss at all, because he made no finding to that effect. In his judgment the "Melanie" was a constructive total loss, when the respondent abandoned her on 3 January 1978.

Counsel for the appellant company submitted to us that this finding was wrong. He contended that before a finding of a constructive total loss could be made there must be a proof that the cost of recovering the "Melanie" would exceed her value when recovered.

To deal with this submission we must refer to s. 60 of the Marine Insurance Act 1906 of the United Kingdom. This Act is made applicable to Malaysia as part of our law by virtue of s. 5(1) of our Civil Law Act 1956. Section 60 of the UK Act defines a constructive total loss as follows.

> 60. Constructive total loss defined.
>
> (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without any expenditure which would exceed its value when the expenditure had been incurred.
>
> (2) In particular, there is a constructive total loss-
>
> (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or
>
> (ii) x x x
>
> (iii) x x x

At a glance we will observe that there are two definitions of a constructive total loss. One definition is given by subsection (1), being a general one and the other by subsection (2), being a more specific and precise one. Each definition contemplates two situations. Under subsection (1), a constructive total loss occurs where:

(a) the insured ship is reasonably abandoned on account of its total loss appearing to be unavoidable; and

(b) the insured ship is reasonably abandoned because she could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

The two situations which come within the more specific and precise definition under subsection (2) are as follows:

(a) where the assured is deprived of the possession of his ship by a peril insured against, and it is unlikely that he can recover her;

(b) where the assured is deprived of the possession of his ship by a peril insured against, and the cost of recovering her would exceed their value when recovered.

A comparison of the two situations in subsection (1) with those in subsection (2) clearly shows that the definition given in subsection (1) is a general definition whilst the situation in subsection (2) is a particular one. (See *Marstrand Fishing Co. Ltd. v. Beer* [1937] 1 All ER 158 at 164).

The two definitions have been the subject of many decisions in England, reaching as far as the House of Lords. Lord Wright in *Petros M Nomikos Ltd. v. Robertson* [1939] 64 L1.L Rep 45 said that subsection (2) is purely an objective definition, whilst subsection (1) deals with actual abandonment which is also an objective fact. His Lordship repeated this view in

Rickards v. Forestal Land, Timber and Railways Co. Ltd. [1941] 3 A11 ER 62 in that whilst the two subsections contain two separate definitions and could be applied to different situations, the definition in subsection (2) is additional to that in subsection (1), and not merely illustrative of it.

Whatever may be the position with regard to these two separate definitions of a constructive total loss, accepting the views of Lord Wright in the two case quoted above we are of the opinion that it is not necessary that in every case wherein a constructive total loss is claimed there must be proof of the cost of recovering the ship. This proof is required only when the assured relies upon the second situation in both definitions. If the two definitions are combined into one, a constructive total loss occurs in either of the following two situations, namely:

1st situation - when the insured ship is reasonably abandoned on account of her actual total loss appearing to be unavoidable, and this may occur where the assured is deprived of her possession and it is unlikely that he could recover her.

2nd situation - when the ship is reasonably abandoned because it could not be preserved from actual total loss without incurring uneconomical expenditure and this may happen when the cost of recovery would exceed her value when recovered.

Thus, it could be seen that the evidence on costing and expenditure are really necessary only if the second situation is relied upon, although it may also be relevant for determining the reasonableness of the abandonment.

In our judgment the "Melanie" would be a constructive total loss if the respondent could prove (1) that her abandonment was reasonable, and (2) that on the date of the commencement of the present action, which is on 22 February 1978, it was unlikely on the basis of the true facts as they then existed that the "Melanie" could be recovered. Both these questions are questions of facts.

The position of the "Melanie" is best described by Mr. Chang Peng Sum (DW1), a marine surveyor, who was commissioned by the appellant company to inspect her.

This witness said:

> I inspected the Melanie on 15 February 1978. She was lying close to the channel about 100 yards south of the inner buoy. I see p. 2 of ABI. What is shown there is about right.
>
> I was on board a fishing boat with the plaintiff and D'Cruz and we got to within about 200 feet of the Melanie.
>
> I swam to the MELANIE. Part of the stern (back portion) was visible, the rest of the boat was under water.
>
> I found the following;
>
> 1. The hull was covered with moderate marine growths and was deeply seated within the sand bar.
> 2. The mizzen mast was broken and dislocated from its base and lying on the port (left) side.
> 3. The after guard rails deformed and twisted.

4. The starboard guard rails missing.

5. A hole about 3 inches by 4 inches on deck starboard side of after guy securing bolt.

6. Detachable equipment missing.

7. Glass windows and aluminium frames along cabin missing.

I did not examine the hull, I am not in a position to say whether the vessel was broken-up. I could not dive to inspect - it was muddy and waves were high.

I made enquiries as to what it would cost to lift up the vessel and put it upright again. It would have cost between RM30,000 and RM35,000. This does not include repairs and replacements.

x x x x x x

(pp. 48 - 49 of Record)

If the Melanie had got aground at the channel and had shipped water and was left therefor a week or so, the equipment inside, e.g. radio, furnishings and fittings would be a total loss. The engine could possibly be salvaged. As far as the hull is concerned it depends on whether keel plate had been broken at time of accident. If left for a long enough period the hull would weaken. The structure of the yacht ferroconcrete and not as resistant to waves as steel.

In February 1977 I would say it was not economical to salvage the Melanie.

(p. 50 of Record)

The respondent in his evidence said:

The opinion that she was beyond salvage was formed when I made out this report on 3 January 1978.

On 31 December 1977 in the afternoon when I got into the boat from the dinghy I got the impression that the hull was broken by being bounced by the waves. The mast was broken off lying beside the hull. There was so much sand that I thought it must have come in from the bottom which means a broken hull.

I looked around at Kuantan for facilities to lift the boat and could not find any.

On the basis of all this I put in the report and wanted to see what the insurance could do.

(pp. 30 - 31 of Record)

Based on the above evidence the learned Judge has this to say when he discussed the situation at Kuantan at the time:

It was the height of the monsoon and there is evidence that the only way in which the "Melanie" could have been lifted was by means of a salvage barge from Singapore which according to PW3 would have cost during the off-monsoon period from RM20,000 to RM30,000 and during the monsoon period somewhat more. DW1 had made enquiries and testified that it would have cost between RM30,000 and RM35,000. This did not include the cost of repairs and replacement. In his report (AB p. 1) the plaintiff had stated that the fittings were completely destroyed or washed out. DW1 also testified that if the vessel had shipped water in a week or so the equipment inside, e.g. the radio and the furnishings and fittings would be a total loss. At that stage he thought that the engine could possibly have been salvaged. In his view by February the vessel was beyond salvage.

(pp. 129 - 130 of Record)

and

> For all intents and purposes the vessel was lying at the bottom of the sea fully submerged at high tide and substantially submerged at low water. It had been buffeted by waves and forcibly pushed further up the sand bar. Its hull may or may not have been holed and being made of ferro-concrete would not take the sort of buffeting that a steel hull would have taken. There was no local facilities for salvaging the vessel and to get a salvage barge out from Singapore would have cost RM30,000 to RM35,000 and the probabilities were that it might have been an action in futility.
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> (pp. 133 - 134 of Record)

We cannot find any fault with the above findings. In our view the "Melanie" was more likely to be lost than recovered and the respondent was therefore fully justified in abandoning his beloved ship. Thus the two questions, i.e. the reasonableness of abandonment and the unlikelihood of recovery are both answered in favour of the respondent.

The appeal is therefore dismissed with costs, the deposit shall be paid to the respondent on account of taxed costs.

Also found at [1984] 1 CLJ 296